

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Petition by AirTouch Paging for Rulemaking to)
Establish a Dedicated 8XX Code for Toll-Free Calls)
Placed from Pay Telephones)

RM No. 9273

REPLY COMMENTS OF
THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL

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June 22, 1998

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Summary

APCC maintains that (1) AirTouch has failed to meet the threshold evidentiary showing for the Commission to consider its petition; (2) AirTouch has presented no evidence of customer demand or need for a dedicated 8xx code for payphone calls; (3) there is only isolated support for AirTouch's proposal; and (4) AirTouch's proposal is not in the public interest because it will result in customer confusion and inconvenience that will discourage payphone use.

In the instant case, AirTouch has failed to put forth any need, demand, support, technical or other evidence that would tend to support its request for Commission establishment of a rulemaking proceeding to consider its proposal. The comments filed in support of the AirTouch Petition, like the petition itself, similarly fail to provide any evidentiary basis for initiating a rulemaking. Without an evidentiary basis for the AirTouch Petition, the commenters in this proceeding, like AirTouch itself, attempt to shift the burden of establishing the grounds for initiating a rulemaking to the Commission and/or those who oppose the proposal. It is not, however, the responsibility of the Commission to conduct an in depth inquiry to determine whether or not AirTouch's proposal warrants a rulemaking proceeding. Rather, it is the responsibility of the proponent of such a proposal to make such a determination *before* filing a petition of this nature. Because the AirTouch Petition and the comments supporting it are little more than a whimsical proposal, without *any* supporting data whatsoever, the Commission should dismiss the petition.

The AirTouch Petition and the commenters also leave unaddressed the technical difficulties and costs associated with re-programming independently-owned “smart” payphones. Such payphones may not be able to distinguish between all calls that require coin deposits and calls that do not. As APCC stated in its initial comments, there are significant difficulties in programming “smart” payphones to recognize a particular block of Nxx numbers within a particular 8xx area code.

The commenters also fail to justify the use of Commission resources on evaluating a proposal that the Commission has, in effect, already rejected. As APCC established in its initial comments however, AirTouch’s current proposal merely echoes its numerous previous proposals on this subject, and offers no new or unique proposition with respect to per-call compensation. AirTouch’s earlier caller pays proposal, the antecedent to the warmed-over version currently at issue, was flatly rejected by the Commission, and the Commission’s decision was subsequently upheld by a reviewing court.

In its petition, AirTouch contends that there is widespread support for its proposal. However, based upon the comments filed in this proceeding, it is clear that there is little, if any, support for AirTouch’s proposal. First, only a few entities filed comments in this proceeding. Second, the only entities that filed comments in support of AirTouch’s petition were a trade association of resellers and a few paging companies, which suggests that interest in reinventing the compensation system for subscriber 800 calls may be limited to paging service providers and resellers. Sprint Corporation, the only IXC to file comments, specifically opposes the AirTouch Petition on the grounds that it “has been overtaken by events and that [AirTouch’s] particular proposal is, in any case, unsound.” In

short, “support” among the commenters for AirTouch’s proposal is, at best, thin and tentative.

AirTouch and the commenters are also wrong in contending that it would be relatively easy and uncomplicated to implement the “caller pays” system proposed by AirTouch. It is more likely that the creation of a dedicated 8xx numbers for toll-free calls will result in customer confusion and inconvenience, which will in turn have the effect of discouraging payphone use.

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Pursuant to the Commission's Public Notice, DA 98-2274, released May 6, 1998, and Section 1.405(b) of the Commission's Rules,¹ the American Public Communications Council ("APCC"), hereby files its reply comments regarding the Petition for Rulemaking to Establish a Dedicated 8XX Code for Toll-Free Calls Placed from Pay Telephones filed by AirTouch Paging ("AirTouch Petition"). In its reply comments, APCC maintains that (1) AirTouch has failed to meet the threshold evidentiary showing for the Commission to consider its petition; (2) AirTouch has presented no evidence of customer demand or need for a dedicated 8xx code; (3) there is only isolated support for AirTouch's proposal; and (4) AirTouch's proposal is not in the public interest because it will result in customer confusion and inconvenience that will discourage payphone use.

¹ 47 C.F.R. §1.405(b).

APCC is a national trade association made up of almost 2,000 manufacturers and providers of independent public payphones. APCC seeks to promote fair competitive markets and high standards of service in the payphone and public communications markets. APCC has actively participated in every major proceeding affecting payphones.

I. AIRTOUCH HAS FAILED TO MEET THE THRESHOLD EVIDENTIARY SHOWING FOR COMMISSION CONSIDERATION OF ITS PETITION

Commission Rule Section 1.401(e) provides that “[p]etitions that . . . plainly do not warrant consideration by the Commission may be denied or dismissed. . .”² The proponent of a petition for rulemaking has an affirmative duty to put forth evidence that would tend to support the institution of a rulemaking proceeding to consider the proponent’s request.³ In the instant case, AirTouch has failed to put forth any need, demand, support, technical or other evidence that would tend to support its request for Commission establishment of a rulemaking proceeding to consider its proposal. The comments filed in support of the AirTouch Petition, like the petition itself, similarly fail to

² 47 C.F.R. §1.401(e). Such evidence includes facts, views, arguments and data deemed to support the action requested. 47 C.F.R. §1.401(c).

³ National Exchange Carrier Ass’n, Inc., Revision of Section 69.605 of the Commission’s Rules to Allow Small Cost Settlement Companies to Elect Average Schedule Settlement Status, 11 FCC Rcd 16504, 16509, ¶ 13, (1996) (denying NECA’s petition to amend rules where NECA did not document harm under existing rules nor identify benefits from new rules); Exemption of Certain Radio Devices to be Used by Law Enforcement Agencies from the Commission’s Equipment Authorization and Licensing Requirements, 6 FCC Rcd 3392, 2293 (1991) (denying petition for rulemaking where “[p]etitioner has not established sufficient reasons to pursue a rulemaking proceeding”); Cable Television Syndicated Program Exclusivity and Carriage of Sports Telecasts, 56 Rad. Reg. 2d 625, ¶¶ 17-20 (1984) (denying petition for rulemaking where no evidence was

provide any evidentiary basis for initiating a rulemaking. As the RBOC/GTE/SNET Payphone Coalition (“RBOC Coalition”) contends, AirTouch’s failure to make *any* evidentiary showing warrants denial or dismissal of its petition.⁴ RBOC Coalition at 4.

Without an evidentiary basis for the AirTouch Petition, the commenters in this proceeding, like AirTouch itself, attempt to shift the burden of establishing the grounds for initiating a rulemaking to the Commission and/or those who oppose the proposal. To this end, the Telecommunications Resellers Association (“TRA”) contends that the Commission should “institute a broader inquiry into the mechanics underlying payphone compensation...” TRA at 5. Similarly, PageMart Wireless, Inc. (“PageMart”) argues that the Commission should grant the petition “to facilitate further fact-finding.” PageMart at 3. It is not, however, the responsibility of the Commission to conduct an in depth inquiry to determine whether or not AirTouch’s proposal warrants a rulemaking proceeding. Rather, it is the responsibility of the proponent of such a proposal to make such a determination *before* filing a petition of this nature. Because the AirTouch Petition and the comments supporting it are little more than a whimsical proposal, without *any* supporting data whatsoever, the Commission should dismiss the petition.

In addition to failing to establish an evidentiary basis for the AirTouch Petition, the commenters fail to address a number of “implementation” issues implicated by the AirTouch Petition. For example, the RBOC Coalition correctly contends that “the

provided that there was a “problem of national scope [requiring] the development of a communications policy.”).

⁴ Id.

establishment of a new 8XX code, with unique characteristics, is a matter [in the first instance] for the Industry Numbering Committee of the Alliance for Telecommunications Industry Solutions (the "INC"), not the Commission." RBOC Coalition at 4. AirTouch, however, has given no indication that it has engaged in any discussions with INC regarding its proposal. These discussions should occur before AirTouch requests that the Commission expend valuable resources to consider AirTouch's proposal. The RBOC Coalition also demonstrates that the Commission itself has conceded that it "has historically left most 800 numbering issues to the industry for resolution."⁵ RBOC Coalition at 5. AirTouch and the commenters supporting its petition have made no attempt has to address the role of others in the industry in the 800 numbering process. RBOC Coalition at 6. Until such time as AirTouch conducts an investigation into the feasibility of its proposed dedicated 8xx code with INC and others in the industry, AirTouch's proposal remains premature, if not untenable.

The commenters also fail to address the technical feasibility of AirTouch's proposal. Although it addresses technical issues concerning LEC-owned payphones, which are "dumb" payphones that tend to have their intelligence located at the switch, the RBOC Coalition points out that AirTouch has not in any way quantified the costs of reprogramming the millions of payphones currently in use. RBOC Coalition at 6.

⁵ In the Matter of Toll Free Access Codes, Notice of Proposed Rulemaking, 10 FCC Rcd 13692, 13695, ¶ 10 (1995).

The AirTouch Petition and the commenters have also left unaddressed the technical difficulties and costs associated with re-programming independently-owned “smart” payphones. AirTouch mistakenly believes that the programming required to implement its proposal is already largely undertaken by independent PSPs.⁶ This, however, is not the case. Although independent payphone providers use “smart” payphones with the intelligence in the set, such “smart” payphones have limits on the functions they can perform. Therefore, such payphones may not be able to distinguish between all calls that require coin deposits and calls that do not. As APCC stated in its comments, there are significant difficulties in programming “smart” payphones to recognize a particular block of Nxx numbers within a particular 8xx area code. APCC at n. 24. Currently, only two interexchange carriers (“IXCs”) have the capability of coin counting or supervising on “dumb” payphones, and no IXC has the ability to coin count or supervise on “smart” payphones.⁷ In short, no party has addressed the technological feasibility of AirTouch’s proposal.

The commenters also fail to justify the use of Commission resources on evaluating a proposal that the Commission has, in effect, already rejected. Many of the comments are premised on the theory that the current proposal offers some new “alternative” to the old “caller pays” concept. For example, RadioFone, Inc. (“RadioFone”) contends that the Commission’s earlier denial of AirTouch’s caller pays

⁶ AirTouch Petition at 5.

⁷ See PageMart at 3 (suggesting that IXCs could offer callers the option of paying for a call at the payphone).

proposal “should not preclude the Commission from adopting AirTouch’s current proposal, because AirTouch’s current proposal “differs from its earlier proposal in that AirTouch is suggesting an alternative to how toll-free calls from payphones otherwise are compensated.” As APCC established in its initial comments however, AirTouch’s current proposal merely echoes its numerous previous proposals on this subject, and offers no new or unique proposition with respect to per-call compensation.⁸ AirTouch’s earlier caller pays proposal, the antecedent to the warmed-over version currently at issue, was flatly rejected by the Commission, and the Commission’s decision was subsequently upheld by a reviewing court.⁹ APCC at 3-5. Accordingly, the Commission should deny AirTouch’s current proposal for the same reasons that it denied AirTouch’s earlier version of the same proposal.

II. AIRTOUCH HAS NOT SUBMITTED ANY EVIDENCE OF 800 SUBSCRIBER PREFERENCES

Although AirTouch purports to know what 800 number subscribers want, its petition provides no indication that it has conducted even a minimal investigation to support its claim. Nor have the commenters supplied any useful data. As APCC stated in

⁸ Sprint argues that the Commission should adopt a caller pays approach for all payphone calls, which is exactly the proposal rejected earlier by the Commission. Sprint at 1-2. Similarly, TRA urges the Commission to “incorporate the AirTouch proposal into its impending remand review of current payphone compensation levels.” TRA at 2. Both statements suggest that the commenters have a more significant agenda than merely “supplementing” the Commission’s rules.

⁹ Nor can AirTouch and its supporters achieve their goal of a “caller pays” system by trying to persuade the Commission to “forebear” from applying Section 228, because such

its comments, when an 800 number subscriber is faced with the choice of whether to pay a payphone surcharge in order to receive a call to their phone number, or to forego the call entirely, it is more plausible to assume that most 800 number subscribers would rather receive the call. APCC at 14-15.¹⁰ The RBOC Coalition points out that perhaps most 800 subscribers depend on calls from payphones as an important source of business: "Potential customers would likely turn to other businesses that offered genuine toll-free calling, either for want of adequate change or out of a reluctance to pay for what the customer has come to expect for free." RBOC Coalition at 8-9.¹¹

AirTouch's proposal appears to be desirable only to a limited class of businesses — paging companies and small to mid-sized resellers. The RBOC Coalition's statement that "AirTouch can suggest no example of a business that would genuinely benefit from its proposal, other than paging carriers" echoes APCC's assessment. RBOC Coalition at 8. Accordingly, the Commission should not consider revisiting its earlier conclusions

forbearance would clearly contradict the intent of Congress to prohibit coin deposits on any 800 number calls.

¹⁰ In contrast, PageMart's statement that "many, if not most" 800 number subscribers would prefer to block all toll free calls placed from payphones seems completely at odds with the growing use of toll-free numbers today. PageMart at 4. Although PageMart attempts to introduce the hazy spectre of possible fraud in conjunction with payphones, the Commission has often stated that the way to deal with fraud is to penalize the perpetrators of fraud, not to burden the entire industry with technically infeasible, economically inefficient procedures.

¹¹ APCC notes that if a subscriber 800 customer does not wish to receive calls from payphones, the customer can simply request its paging company block such calls. RadioFone, for example, blocks calls from payphones. RadioFone at 3.

regarding a "caller pays" system without any showing of what 800 number subscribers want or need.

III. THERE IS ONLY ISOLATED SUPPORT FOR AIRTOUCH'S PROPOSAL

In its petition, AirTouch contends that there is widespread support for its proposal. AirTouch Petition at 7. However, based upon the comments filed in this proceeding, it is clear that there is little, if any, support for AirTouch's proposal. First, only a few entities filed comments in this proceeding. Second, the only entities that filed comments in support of AirTouch's petition were a trade association of resellers and a few paging companies, which suggests that interest in reinventing the compensation system for subscriber 800 calls may be limited to paging service providers and resellers. Even those comments filed in "support" of AirTouch's petition suggest that some of the commenting parties have mixed emotions about AirTouch's proposal. For example, although it filed comments "in support" of the AirTouch Petition, PageMart appears just as concerned about leaving any other option open: "by supporting the implementation of an 8XX code, [it] does not wish to preclude the possibility of the adoption of an alternative scheme to achieve the same objective." PageMart at 3. Similarly, TRA "supports" the proposal but hesitates in vouching for its mechanics: "[TRA] is unable to comment at this time on the technical feasibility of the alternative toll free service proposed by AirTouch." TRA at 4. Sprint Corporation ("Sprint"), the only IXC to file comments, specifically opposes the AirTouch Petition on the grounds that it "has been overtaken by events and that

[AirTouch's] particular proposal is, in any case, unsound."¹² In short, "support" among the commenters for AirTouch's proposal is, at best, thin and tentative. Accordingly, the Commission should decline to institute a rulemaking proceeding based upon such shaky "support".

IV. AIRTOUCH'S PROPOSAL IS NOT IN THE PUBLIC INTEREST

In adopting its per-call compensation system, the Commission provided carrier-payors with significant latitude on how they could recover the compensation paid to payphone service providers ("PSPs"). For example, the Commission's rules permit carriers to recover such costs by use of market-based solutions such as absorbing the costs on behalf of customers, increasing service rates, or passing through surcharges. Although most carriers appear to be satisfactorily recovering, perhaps over-recovering, their compensation costs through these market-based options, AirTouch and the commenters have completely disregarded all of these and any other possible market-based options for recovering its compensation costs. AirTouch and the commenters, however, have provided no evidence to indicate that the use of any market-based solution is not an effective means to recover its compensation costs. In fact, AirTouch provides no evidence in its petition to indicate that its customers have seriously resisted, much less rejected, any attempt by AirTouch to raise rates, impose usage surcharges, or pass through compensation costs.

¹² Sprint notes, however, that it "supports the calling party pays approach to payphone compensation," but contends that that approach should apply to all payphone calls. Sprint at 1.

PageMart argues that “[w]ithout the dedicated 8XX option [proposed by AirTouch], paging companies such as PageMart will be required to consider imposing variable charges on customers to recover the costs associated with paging calls made from payphones.” PageMart at 5. See also TRA at 3. Yet, this is precisely one of the options that PageMart and others have under the Commission’s rules. The paging companies and others that support the AirTouch Petition would rather have the Commission resurrect the multi-rejected “caller pays” approach instead of using the market-based options afforded to them under the Commission’s rules. Instead of cutting their prices and competing amongst themselves to bring customers superior service, the commenters prefer to have the Commission jettison a compensation system that has barely begun to be established and substitute it with one that will breed customer confusion and possibly eradicate the usefulness of toll-free calling. Accordingly, the Commission should not allow AirTouch’s refusal even to explore market-based options to recover its compensation costs to serve as the basis for revisiting the matter of “caller pays.”

Nor is there a need for the Commission to take action to bring competition to the payphone marketplace. On the contrary, competition already exists. PageMart argues in its comments that “[w]ithout a dedicated 8XX code that allows some callers to pay for certain toll-free calls from payphones, competitive PSPs would be unable to attract toll-free callers based upon price.” PageMart at 6. In addition, TRA contends that AirTouch’s proposal would “serve Congressional and Commission goals by creating choices for consumers and carriers.” TRA at 4. However, as APCC stated in its comments, competition in the payphone marketplace is progressing quite well under the Commission’s current

compensation system. APCC at 11-12. AirTouch's proposal would add nothing at all. Therefore, the Commission should reject the premise that competition is not working in the payphone marketplace.

AirTouch and the commenters are also wrong in contending that it would be relatively easy and uncomplicated to implement the "caller pays" system proposed by AirTouch. RadioFone, for example, believes implementation of AirTouch's proposal would be as simple as "establish[ing] a set of numbers that are 'not understood to be toll free' (and would not be advertised as toll free)."¹³ RadioFone at 4. RadioFone goes on to say that AirTouch's proposed dedicated non-toll-free 8xx code would not be confusing "as long as consumers are educated about the new numbers..." RadioFone at 6. Like AirTouch, however, RadioFone provides no information at all regarding how such education would occur. Educating customers is easier to assert than it is to do because with the use of "888" and "877" exchanges for toll-free calls today, and possibly additional exchanges tomorrow, callers would not necessarily grasp that a new 8xx number was of another, non-toll-free variety. APCC at n. 30. Similarly, MobileMedia claims that "because a special series of 8XX numbers will be set aside for these calls, the calling party should know that he or she will be required to pay for the call," but it provides no information regarding exactly how or why the calling party should or would know of such a requirement. MobileMedia at 4.

¹³ Elsewhere in its comments, RadioFone makes clear that this refers to calls that are coin-deposited but toll free.

It is more likely that the creation of a dedicated 8xx numbers for toll-free calls will result in customer confusion and inconvenience, which will in turn have the effect of discouraging payphone use. APCC at 13. As APCC stated in its comments, when a customer approaches a payphone and prepares to dial a "toll free" number, the customer's expectation is that the call will be free, and he or she is unconcerned with the need for carrying or finding coins to place the call. APCC at 13. In addition, the customer's reaction upon being asked to deposit the price of a local call to complete a call that has always been "free" will likely be one of confusion and frustration, and the caller may well hang up and assume that the payphone is not working properly or is otherwise defective.¹⁴ APCC at 13-14. Or, in the alternative, the unprepared caller would be forced to struggle to locate enough change to complete the "free" call. APCC at 14. The statement by the RBOC Coalition that "[c]onsumers have come to expect that toll-free numbers are genuinely toll free" and that "institut[ing] a calling party pays plan for some toll free calls would bring about a strong negative reaction from customers, who would likely blame the payphone operator" fully supports APCC's arguments on this subject. RBOC Coalition at 10-11. The Commission cannot accommodate AirTouch's request at the expense of the caller. Accordingly, the Commission must decline to consider a "caller pays" compensation system.

¹⁴ APCC notes that payphone customers often take out their frustration on the payphones themselves by banging on the handset on the payphone box.

Respectfully submitted,

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June 22, 1998

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 1998, a copy of the foregoing Reply Comments of the American Public Communications Council was sent by United States mail, first-class postage prepaid, to the following:

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